

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

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4 ORLAN CHARLES HORNE,
5 Plaintiff,

6 v.

7 ANDRES N. BERTOTTO, S.A.I.C. and
8 HIDRO GRUBERT U.S.A., INC.,
9 Defendants.

Case No. 2:14-cv-00389-APG-NJK

**ORDER DENYING SUMMARY
JUDGMENT AND GRANTING
MOTION TO STRIKE**

(Dkt. #26, #31)

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11 Plaintiff Orlan Charles Horne previously obtained a default judgment against defendant
12 Hidro Grubert U.S.A., Inc. (“HG USA”) for over \$5 million in a Nevada state court lawsuit.
13 Horne subsequently brought this lawsuit against HG USA and defendant Andres N. Bertotto,
14 S.A.I.C. (“ANB”). Horne alleges ANB is the alter ego of HG USA and thus should be liable for
15 the default judgment.

16 Horne moves for summary judgment, arguing the two companies shared officers, ANB
17 trademarked the name Hidro Grubert in the United States, the two companies share the same
18 business address in Argentina, and HG USA let its corporate charter lapse. He therefore argues
19 no genuine issue of material fact remains that the two companies are alter egos. ANB responds
20 that the evidence does not support a finding there was a unity of ownership. ANB also argues
21 Horne has not shown that adhering to corporate separateness would sanction a fraud or promote
22 injustice.

23 Horne moves to strike the interrogatory responses attached to ANB’s opposition, arguing
24 they were not timely and were not previously served on him. ANB responds that it is difficult to
25 quickly obtain signed documents because ANB is located in Argentina. ANB also argues the
26 responses were served through the court’s electronic filing system when ANB filed its opposition.

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I. BACKGROUND

Horne obtained a default judgment in Nevada state court on January 29, 2010 against HG USA in the amount of \$5,169,829.15. (Dkt. #26 at 29-30.) In this lawsuit, Horne seeks to hold ANB liable as HG USA's alter ego. As evidence of alter ego status, Horne presents the following:

- An undated and unauthenticated insurance policy obtained by ANB listing HG USA as an insured sales representative of ANB. (*Id.* at 16.)
- A trademark application dated June 10, 1996 made by ANB seeking to trademark "Hidro-Grubert" in the United States. (*Id.* at 37-40; Dkt. #26-1 at 1-5.)
- An untranslated document in Spanish that appears to be ANB's application to trademark the name HIDROGRUBERT in Argentina. (Dkt. #26-1 at 7-9.)
- Documents from Florida's Secretary of State showing that:
 - HG USA was incorporated in Florida on August 13, 1996. (*Id.* at 13.)
 - Pursuant to the Articles of Incorporation, HG USA's principal address was in Miami, Florida. (*Id.* at 14.)
 - Sergio Andres Bertotto was HG USA's president and director. (*Id.* at 15, 21.)
 - Domingo Bertotto was HG USA's treasurer. (*Id.* at 21.)
 - Leticia Bertotto was HG USA's secretary. (*Id.* at 26.)
- An unauthenticated printout that appears to be from the Florida Department of State, Division of Corporations showing HG USA dissolved in September 2008. (Dkt. #26-2 at 4.)
- Untranslated Spanish printouts from the website www.hidrogrubert.com that refer to ANB and "HIDRO-GRUBERT." (Dkt. #26-3 at 13-17.)

ANB initially provided unsigned interrogatory responses in support of its opposition to Horne's summary judgment motion. (Dkt. #28.) A few days later, ANB filed a supplement attaching signed interrogatory responses. (Dkt. #29.)

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II. DISCUSSION

A. Motion to Strike

Horne moves to strike the signed interrogatory responses arguing that ANB did not timely respond to Horne's discovery request and ANB failed to request leave to file the supplemented responses late. Horne granted ANB an extension to respond by October 3, 2014, but ANB did not respond until it filed the supplement on November 5, 2014. Horne further contends the interrogatory responses were not served on him prior to being filed as the supplement.

ANB responds that the supplement merely adds the signature to the interrogatories and does not otherwise alter the substance of its opposition to Horne's summary judgment motion. ANB argues that because it is headquartered in Argentina, it is difficult to obtain sworn statements. Finally, ANB contends the responses were served through the court's electronic case filing system when ANB filed the supplement.

Federal Rule of Civil Procedure 33 permits a party to serve interrogatories on other parties and provides that the responding party "must serve its answers and any objections within 30 days after being served with interrogatories." Fed. R. Civ. P. 33(a) & (b)(2). Pursuant to Rule 37(d)(1) and (3), I may impose sanctions authorized under Rule 37(b)(2)(A)(i)-(vi) on a party who fails to respond to interrogatories.

Horne granted ANB an extension of time to respond to interrogatories until October 3, 2014. (Dkt. #31 at 6.) ANB did not respond by that date and there is no evidence ANB requested another extension. Instead, ANB filed signed interrogatories in the electronic case filing system a month after the extension deadline and several weeks after the dispositive motion deadline. ANB's only explanation is that it is difficult to obtain sworn statements from the client in Argentina. ANB provides no evidence to support a finding that it did not have adequate time to obtain signed interrogatories from Argentina. Moreover, ANB does not explain why it did not seek another extension when it became apparent it would not meet the October 3 deadline. In light of these circumstances, I grant Horne's motion and preclude ANB from introducing the

1 interrogatory responses into evidence to support its opposition to summary judgment. Fed. R.
2 Civ. P. 37(b)(2)(A)(ii).

3 **B. Motion for Summary Judgment**

4 Summary judgment is appropriate if the pleadings, discovery responses, and affidavits
5 demonstrate “there is no genuine dispute as to any material fact and the movant is entitled to
6 judgment as a matter of law.” Fed. R. Civ. P. 56(a), (c). A fact is material if it “might affect the
7 outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
8 (1986). An issue is genuine if “the evidence is such that a reasonable jury could return a verdict
9 for the nonmoving party.” *Id.*

10 The party seeking summary judgment bears the initial burden of informing the court of the
11 basis for its motion and identifying those portions of the record that demonstrate the absence of a
12 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden
13 then shifts to the non-moving party to go beyond the pleadings and set forth specific facts
14 demonstrating there is a genuine issue of material fact for trial. *Fairbank v. Wunderman Cato*
15 *Johnson*, 212 F.3d 528, 531 (9th Cir. 2000). I view the evidence and reasonable inferences in the
16 light most favorable to the non-moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523
17 F.3d 915, 920 (9th Cir. 2008).

18 To determine alter ego liability, I apply the law of the forum state: Nevada. *In re*
19 *Schwarzkopf*, 626 F.3d 1032, 1037-38 (9th Cir. 2010). The alter ego doctrine is an exception to
20 Nevada’s “general rule recognizing corporate independence.” *Truck Ins. Exch. v. Palmer J.*
21 *Swanson, Inc.*, 189 P.3d 656, 660 (Nev. 2008) (quotation omitted). To establish alter ego
22 liability:

23 (1) The corporation must be influenced and governed by the person asserted to be
24 its alter ego[;] (2) [t]here must be such unity of interest and ownership that one is
25 inseparable from the other; and (3) [t]he facts must be such that adherence to the
fiction of separate entity would, under the circumstances, sanction a fraud or
promote injustice.

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1 *Ecklund v. Nev. Wholesale Lumber Co.*, 562 P.2d 479, 479-80 (Nev. 1977) (quotation omitted).

2 The party seeking to establish alter ego liability must show each of these elements by a
3 preponderance of the evidence. *Id.* at 480.

4 *1. Influence*

5 Horne argues ANB influenced and governed HG USA because both companies were run
6 by Sergio Andres Bertotto, Leticia Bertotto, and Domingo Bertotto. Horne presents no evidence
7 these three individuals are owners or officers of ANB. Horne's motion cites to docket numbers
8 21 and 23 for this proposition. But ANB's counsel states in those documents that the
9 "relationship to [ANB] of the deponents is unclear." (Dkt. #21 at 3.) According to him, it is
10 "likely" that Sergio Andres Bertotto is a board member and CEO of ANB but it remained unclear
11 whether Leticia Bertotto and Domingo Bertotto were ANB employees. (*Id.* at 3, 5; Dkt. #23-1 at
12 3.) Even if these three individuals were board members or owners of both companies, the "mere
13 fact" of common ownership, "while relevant, is insufficient to show that the Nevada firm was
14 influenced and governed by the [Argentina] firm." *Truck Ins. Exch.*, 189 P.3d at 660-61.

15 *2. Unity of Interest*

16 To evaluate whether there is a unity of interest, I consider factors such as "commingling
17 of funds, undercapitalization, unauthorized diversion of funds, treatment of corporate assets as the
18 individual's own, and failure to observe corporate formalities." *Lorenz v. Beltio, Ltd.*, 963 P.2d
19 488, 497 (Nev. 1998). "No one of these factors alone is determinative to apply the alter ego
20 doctrine." *Id.*

21 Horne has presented no evidence the two companies intermingled funds. The only
22 evidence on this point shows HG USA paid the Florida Secretary of State out of HG USA's own
23 bank account drawn on a bank located in Miami, Florida. (Dkt. #26-3 at 3.) Horne presents no
24 evidence HG USA was undercapitalized other than the fact that the company ultimately dissolved
25 after over 10 years of existence. He presents no evidence ANB treated HG USA's assets as its
26 own. And he presents no evidence ANB and HG USA failed to observe corporate formalities.

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1 Instead, Horne relies on an undated and unauthenticated insurance policy where ANB
2 added HG USA as an additional insured. Even if I considered this evidence, that one company
3 includes another as an additional insured on a policy does not support a finding of alter ego.
4 Likewise, that ANB applied for the “Hidro-Grubert” trademark in the United States does not
5 support a finding that ANB and HG USA are alter egos without further information regarding
6 agreements between the two companies about the trademark’s use. Finally, Horne relies on his
7 assertion that the two entities shared office space in Argentina, but the evidence shows HG USA
8 operated out of a Miami, Florida address. (*See, e.g.*, Dkt. #26-2 at 4, 29; Dkt. #26-3 at 1-9.)

9 3. *Fraud or Injustice*

10 Horne argues failing to disregard corporate separateness would sanction fraud or promote
11 injustice because HG USA has dissolved and apparently cannot satisfy the default judgment. The
12 mere fact that HG USA cannot satisfy a judgment against it is insufficient, however, to establish
13 this element. Horne has presented no evidence that the corporate form was a sham or was abused.
14 *See, e.g., LFC Mktg. Group, Inc. v. Loomis*, 8 P.3d 841, 847 (Nev. 2000) (holding that “carefully
15 designed business arrangements . . . contributed to the . . . inability to collect the[] judgment”);
16 *Polaris Indus. Corp. v. Kaplan*, 747 P.2d 884, 888 (Nev. 1987) (finding injustice where officers
17 treated corporate funds as their own and withdrew money from the corporation for their personal
18 use instead of paying corporate debts).

19 4. *Summary*

20 Horne has not met his initial burden under Rule 56 of demonstrating no issue of fact
21 remains such that he is entitled to judgment as a matter of law. Accordingly, I deny his motion
22 for summary judgment.

23 **III. CONCLUSION**

24 IT IS THEREFORE ORDERED that plaintiff Orlan Charles Horne’s motion for summary
25 judgment (Dkt. #26) is DENIED.

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1 IT IS FURTHER ORDERED that plaintiff Orlan Charles Horne's motion to strike (Dkt.
2 #31) is GRANTED.

3 DATED this 13th day of May, 2015.



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5 ANDREW P. GORDON
6 UNITED STATES DISTRICT JUDGE
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